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ALEXANDER L. STEVAS

Nos. 84-6156 and 84-5249

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

VELMA P. COOPER, PETITIONER

v.

UNITED STATES OF AMERICA

OSCAR W. WESLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars cumulative punishment at a single trial for separate convictions under 18 U.S.C. 1503 and 18 U.S.C. 1512.

2. Whether the crime of advising a witness to lie in an official proceeding must be prosecuted only under 18 U.S.C. 1512 instead of 18 U.S.C. 1503.

3. Whether the evidence was sufficient to sustain the convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) 1/ is reported at 748 F.2d 962.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1984. The petition for a writ of certiorari in No. 84-6156 was filed on January 24, 1985; the petition in No. 84-6249 was filed on February 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner Wesley was

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1/ "Pet. App." refers to the supplemental appendix to the petition for a writ of certiorari in No. 84-6156, which contains the full text of the court of appeals' opinion. Pursuant to Rule 47.5 of the Fifth Circuit, portions of the opinion that have no precedential value are not published and, accordingly, only excerpts appear at 748 F.2d 962.

convicted of possession in commerce of a firearm by a convicted felon, in violation of 18 U.S.C. App. 1202(a)(1) (Count 1); obstructing justice in violation of 18 U.S.C. 1503 (Count 3); and tampering with a witness, in violation of 18 U.S.C. 1512 (Count 4). Petitioner Cooper was convicted of obstructing justice in violation of 18 U.S.C. 1503. Petitioner Wesley was sentenced to consecutive prison terms of two years on Count 1, five years on Count 3, and five years suspended on Count 4. Petitioner Cooper was sentenced to a suspended five-year prison term.

1. The evidence, as summarized by the court of appeals (Pet. App. 2-3), is as follows. Petitioner Wesley pawned a .38 caliber revolver at the Airline Pawnshop in Baton Rouge, Louisiana and signed the receipt for the gun. After he was arrested on the charge of possession in commerce of a firearm by a convicted felon, Wesley claimed that the pawned pistol belonged to his former step-daughter, Cheryl Berry, and that he signed the receipt at the pawnshop owner's request because Berry was a minor.

Following his arrest, Wesley called petitioner Cooper, his living companion. After receiving the call, Cooper went unannounced to Berry's house and urged Berry to attend Wesley's bail hearing and corroborate his story. In response, Berry said that Wesley's story was false and that she would not attend the hearing. Cooper then told her (Pet. App. 2-3), "I just only telling you * * * what Oscar said * * * [and] Oscar said if you don't go, that he would be out there to talk to you." Berry thought that petitioner Cooper was trying to scare her and she considered Cooper's statement to be a threat.

Rather than attend the bail hearing, Berry stayed at home with the doors locked. Angry that Berry was absent from the hearing, petitioner Cooper told a friend (Pet. App. 3), "the little bitch <u>will</u> testify that it is her gun." About one week after his arrest, petitioner Wesley was released on bail. The

following day he drove slowly past Berry's house honking his horn.

2. The court of appeals affirmed (Pet. App. 1-18). It rejected Wesley's challenges to the sufficiency of the evidence on the firearms and witness tampering charges. The court also rejected the contention that the events involving Berry should have been prosecuted only under 18 U.S.C. 1512. In so ruling, the court recognized that when Section 1512 was enacted in 1982, Section 1503 was amended to delete all references to witnesses; nevertheless, the applicable portion of Section 1503 -- the residual clause proscribing obstruction of justice -- was unchanged and remains applicable to petitioners' conduct.

ARGUMENT

1. Both petitioners contend (84-6156 Pet. 2-4; 84-6249 Pet. 7-8) that their prosecution under Sections 1503 and 1512 violate the Double Jeopardy Clause. 2/ This contention lacks merit.

In a multi-count single trial, the Double Jeopardy Clause bars only cumulative punishment in excess of the limits prescribed by the legislature. Ohio v. Johnson, No. 83-904 (June 11, 1984) slip. op. 6. Under the established standards, it is clear that Congress intended cumulative punishment for separate convictions under Sections 1503 and 1512(a). First, the statutes list separate offenses under separate penalty schemes. See Albernaz v. United States, 450 U.S. 333, 336 (1981). Second, each offense requires proof of an element that the other does not. United States v. Woodward, No. 83-1947 (January 7, 1985). Section 1503 requires proof of the existence of a pending judicial proceeding known to the violator. See Pettibone v. United States, 148 U.S. 197, 205-207 (1893); United States v. Vesich, 724 F.2d 451, 454 (5th Cir.), on rehearing, 726 F.2d 168 (1984); United States v. Johnson, 605 F.2d 729, 730 (4th Cir.

2/ Since Cooper was acquitted on the Section 1512 charge, her judgment of conviction would be unaffected by the resolution of this issue.

1979), cert. denied, 444 U.S. 1020 (1980). Section 1512 contains no similar requirement. On the other hand, Section 1512(a) requires proof that the violator either intimidated, threatened or used physical force or misleading conduct towards another person. Section 1503 does not require this element. Thus, cumulative punishment is authorized at a single trial for separate convictions stemming from one transaction under these statutes. See United States v. Wilson, 565 F. Supp. 1416, 1433 (S.D.N.Y. 1983).

2. Petitioners also contend (84-6156 Pet. 3; 84-6249 Pet. 9-12) that their convictions under Section 1503 were improper because Section 1512 preempts all prosecutions for witness tampering. This contention is without merit.

Prior to its amendment in 1982, Section 1503 read as follows (underlined portions were deleted in 1982):

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more that $5,000 or imprisoned not more than five years, or both.

In cases decided under that statute, the courts consistently recognized that a request to a witness to testify falsely in

official proceedings constituted obstruction of justice within the Section's residual clause. See, e.g., United States v. Vesich, 724 F.2d 451, 455-456 (5th Cir. 1984); United States v. Friedland, 660 F.2d 919, 930 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982); United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); Falk v. United States, 370 F.2d 472, 475-476 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

When the Victim and Witness Protection Act, 18 U.S.C. 1512, was enacted, 3/ Congress deleted all references to witnesses from Section 1503. Congress did not, however, alter the residual clause of Section 1503 in any way. When Congress amends part of a statute but leaves another part intact, the two provisions are given "as full a play as possible." Markham v. Cabell, 326 U.S. 404, 411 (1945). Thus, by leaving the residual clause of Section 1503 untouched, Congress in effect ratified the judicial interpretations of that clause that reached the conduct of asking a witness to lie in official proceedings. This construction is reasonable because Sections 1503 and 1512 are directed at different goals: Section 1503 guards against the corruption of judicial proceedings (by whatever method) whereas Section 1512 protects witnesses.

Contrary to petitioners' contention (84-6156 Pet. 3; 84-6249 Pet. 9), it is not clear that the decision below conflicts with the decision of the Second Circuit in United States v. Hernandez,

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3/ Section 1512 provides in pertinent part:

> (a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person with intent to-
>
> (1) influence the testimony of any person in an official proceeding;
>
> * * *
>
> Shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

730 F.2d 895 (1984). In Hernandez, the defendant was convicted of threatening a witness in order to obtain documentary evidence, in violation of Section 1503. The court of appeals vacated his conviction under Section 1503 but there is some ambiguity in its opinion. The court states at one point that Congress "intended to remove witnesses entirely from the scope of § 1503" (730 F.2d at 898) and elsewhere in its opinion that "Congress intended that intimidation and harrassment of witnesses should thenceforth be prosecuted under § 1512 and no longer fall under § 1503" (id. at 899). Since the facts in Hernandez involved intimidation, the court's narrower statement is its holding. Accordingly, not until the Second Circuit has occasion to consider the issue in a case where a witness is asked to lie -- without intimidation or harrassment -- will its full reading of the relevant statutes be known. See United States v. Beatty, 587 F. Supp. 1325 (E.D.N.Y. 1984) (permitting prosecution under Section 1503 for urging witnesses to give false testimony to grand jury and for providing misleading handwriting samples to grand jury); United States v. King, 597 F. Supp. 1228 (W.D.N.Y. 1984) (asking informant to lie to authorities does not violate Section 1512).

In the meantime, the parameters of any potential conflict among the circuits remain hazy; indeed, the conflict may well be resolved as the lower courts have further experience with the legislation passed in 1982. See e.g. United States v. Lester, 749 F.2d 1288 (9th Cir. 1984).

3. Petitioners also contend (84-6156 Pet. 3; 84-6249 Pet. 13-18) that their convictions are not supported by the evidence. These factbound questions do not merit further review.

The jury had ample evidence from which to conclude that petitioner Cooper urged Berry to lie at petitioner Wesley's bail hearing. Although Cooper contends that all she did was tell Berry to tell the truth, the jury reasonably could have concluded that Cooper's insistence that Berry corroborate Wesley's story after Berry said it was untrue was intended to encourage Berry to

testify falsely. Similarly without merit are Wesley's arguments (84-6249 Pet. 13-15): (1) that he could not have threatened Berry because he was incarcerated, and (2) that Cooper did not threaten Berry as evidenced by the jury's acquittal of her on that charge. Wesley could properly be convicted as an aider and abettor to the threat despite his incarceration when the crime occurred. United States v. Garrett, 720 F.2d 705, 713 (D.C. Cir. 1983), cert. denied, No. 83-6067 (Feb. 21, 1984); United States v. Molina, 581 F.2d 56, 61 & n.8 (2d Cir. 1978). His conviction is unaffected by the jury's acquittal of Cooper. See United States v. Powell, No. 83-1307 (Dec. 10, 1984); Standefer v. United States, 447 U.S. 10 (1980); Dotterweich v. United States, 320 U.S. 277 (1943). 4/

4. Petitioner Wesley also contends (84-6249 Pet. 16-18) that the evidence fails to support his conviction for possession of a firearm by a felon. As the court of appeals stated (Pet. App. 5-7) the evidence showed that R.G. Industries manufactured the pistol in Miami, Florida, in 1974 and then shipped it to Jackson, Mississippi. The pistol was a "firearm" because it was designed to expel a projectile by an explosive. The pawnshop owner examined the pistol when Wesley pawned it and determined that it was working properly. Although the pawnshop owner erroneously copied the serial number of the pistol as "0054616" instead of "Q054616", a Bureau of Alcohol, Tobacco and Firearms agent examined the pistol pawned by Wesley and determined that the tail of the "Q" was worn and resembled an "O" (Tr. 71-72, 96). These facts, taken in the light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942), amply established that petitioner Wesley, a prior felon, possessed a firearm that had been in interstate commerce.

4/ The jury might have determined that Cooper failed to understand fully that her message to Berry was a threat, but that Wesley understood its full meaning. Accordingly, the jury's verdicts are consistent.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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